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No. 94-171

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

James L. Toler, *Petitioner*

v.

United States of America, *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

PETITIONER'S REPLY MEMORANDUM

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The United States in its Opposition to the Petition for a Writ of Certiorari (herein "Opp."), agrees with the Petitioner "that the circuits have adopted a variety of approaches to the question of when instructions concerning deliberate ignorance may be given." Opp. at 12. The United States also appears to agree that the issue is an important and recurring one in the federal courts. Nonetheless, the United States opposes the Petition because, it argues, (1) the instruction was proper in this case under any standard and (2) the error, if any, was harmless.

Neither of these arguments finds any support in the opinion of the court of appeals. The Fifth Circuit upheld the instruction based solely upon what it found to be "suspicious circumstances" and "deliberate indifference" by Mr. Toler; it cited no factual basis, nor is there any, for a finding that Mr. Toler "purposely contrived" to avoid learning the truth, which is required to permit the instruction under the law of the other Circuits. E.g., United States v. Hilliard, 31 F.3d 1509, 1514 (10th Cir. 1994). Further, the Fifth Circuit did not address the issue of harmless error, a question that -- in the context of the willful blindness instruction -- has itself produced an acknowledged split among the Circuits.

Contrary to the position of the United States, the case of Mr. Toler presents precisely the set of facts upon which the Court should consider and resolve the proper use of the willful blindness instruction, a question that has split and will continue to bedevil courts of appeals unless and until it is decided by this Court. [1]

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[1] On October 3, 1994, this Court denied the petition for certiorari filed by Mr. Toler's co-defendant D.L. Faulkner. Faulkner v. United States, No. 94-100. Although Mr. Faulkner presented the appropriateness of the willful blindness instruction as one of three issues in his petition, the court of appeals noted in its opinion discussing deliberate ignorance that Faulkner and co-defendant Blain made "no attempt to brief this fact-specific issue as it applies to them." Pet. at 40a, n. 33, 17 F.3d at 767. The Fifth Circuit's analysis of the issue addressed solely the case of Mr. Toler.

1. There Was No Evidence of Deliberate Acts by Mr. Toler to Avoid Knowledge

The United States concedes that on the facts adduced at trial, the jury could have believed evidence suggesting that Mr. Toler did not know, for example, that the appraisals were falsified. However, the United States argues that the jury could also have adopted a different theory:

> [T]he jury reasonably could have concluded that [the Petitioner's] effort to avoid looking into the appraisals was a reflection of his own knowledge that they were fraudulent.

Opp. at 9. The United States cites no evidence at trial of any "efforts" by Mr. Toler to avoid information regarding the appraisals, nor was there any.

Lacking evidence of deliberate acts to avoid knowledge, the United States in its Opposition emphasizes what Mr. Toler testified he did not know, apparently in an effort to suggest that such lack of knowledge could only have been attributable to deliberate ignorance. The Opposition misstates Mr. Toler's testimony in several respects, [2] but

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[2] For example, the Opposition erroneously states that Mr. Toler "disclaimed knowledge of the details of most of the land transactions." Opp. at 4. On the contrary, Mr. Toler testified at great length about details of land transactions in which he was involved; he disclaimed knowledge only of the numerous transactions in which he had no participation. As another example, the United States says that Mr. Toler disclaimed knowledge of Spencer Blain's involvement in a number of land transactions "in which petitioner was also involved." Opp. at 5. That is not so; Mr. Toler merely disclaimed knowledge of Blain's receipt of monies in transactions in which Mr. Toler was not involved, for example, Blain's receipt of $1.4 million from Clifford Sinclair as a "consulting fee"

more important, it fails to acknowledge that Mr. Toler was not a fiduciary of any savings and loan; he was not a borrower at any savings and loan; he arranged few, if any, appraisals charged to be false; and he had no involvement in, or knowledge of, the falsification by Clifford Sinclair and numerous investors of financial statements submitted to qualify for loans.

In the absence of evidence that Mr. Toler made a deliberate effort not to learn of the appraisals' falsity, what is left is merely Mr. Toler's lack of knowledge of their falsity in the face of "suspicious circumstances," i.e., rapidly rising land prices in what was concededly a boom market, and easily obtained land loans from aggressive, recently deregulated savings and loans. A failure to "investigate" in the face of suspicious circumstances, and a failure to discover that the reason for the suspicious circumstances was illegal activity by others, constitutes negligence, or, at best, recklessness.

The United States next argues that since the jury was instructed that mere negligence did not suffice, the jury must have found actual knowledge. This only points up what other Circuits have observed: where the evidence presents only a choice between negligence and actual knowledge, the deliberate ignorance instruction has no place and can only invite the jury to convict on less than a finding of knowledge.

Moreover, in the absence of any evidence of deliberate efforts to avoid knowledge, the instruction permitted the jury to infer actual knowledge based on evidence that at best can be described as demonstrating recklessness, i.e., a failure to recognize that the circumstances were suspicious and to investigate further. Thus, even if the jury understood that it

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on a development in which Mr. Toler had no participation whatsoever.

could not base guilt on mere negligence, the instruction erroneously allowed for a finding of guilt based on recklessness.

Lastly, the permissive nature of this instruction does not save it. The trial court can no more permit the jury to convict based on an inadequate mens rea than it can mandate the jury to do so.

2. Under Fifth Circuit Law the Error Was Not Harmless

The United States argues that even if the Petitioner is correct and "the instruction were not supported by the record in this case, its use would not warrant the reversal of petitioner's convictions." Opp. at 11. This contention is not a basis for the Court to deny this Petition for two reasons.

First, assuming an erroneous deliberate ignorance instruction is not automatically harmless error whenever the evidence could have led the jury to find actual knowledge, it was certainly not harmless in this case. The issue of James Toler's knowledge of fraud was unquestionably a close one in this case. The first trial ended in a hung jury; the jury here deliberated five full days; and the prosecutor relied on the deliberate ignorance instruction in closing argument.

Second, the United States is incorrect in arguing that the error in this case was harmless as a matter of law. As with just about every other aspect of the deliberate ignorance instruction, the Circuits are hopelessly divided on when an erroneously delivered deliberate ignorance instruction is harmless. Thus, if the United States were correct that this Court would reach the issue of whether the error was harmless, despite the Fifth Circuit's failure to do so, the lack

of agreement among the Circuits on the appropriate harmless error analysis presents an additional reason for granting certiorari in this case.

In United States v. Stone, 9 F.3d 934 (11th Cir. 1993), cert. denied, (October 3, 1994)(No. 93-9134), the Eleventh Circuit ruled that giving a properly worded deliberate ignorance instruction can never be reversible error. Id. at 939. The Stone court, as does the Solicitor General, relied in large part on this Court's decision in Griffin v. United States, 502 U.S. 46 (1991) (harmless error to submit to jury object of conspiracy not supported by sufficient evidence, where there were other objects for which there was sufficient evidence). See Stone at 938-39; Opp. at 11.

However, other Circuits, in addressing the issue subsequent to Griffin, have concluded that giving a deliberate ignorance instruction unsupported by the evidence can be reversible error. Indeed, the Stone court acknowledged that its ruling was a departure from the law in the Fifth, [3] Eighth and Ninth Circuits. Stone at 939.

The Tenth Circuit has recently demonstrated that it too disagrees with the proposition that a deliberate ignorance instruction is always harmless. In United States v. Hilliard, 31 F.3d 1509 (10th Cir. 1994), the court reiterated that the use of a deliberate ignorance instruction is permissible "'only

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[3] It is not entirely clear how harmless error is analyzed in the Fifth Circuit in the context of a deliberate ignorance instruction. Compare United States v. Cartwright, 6 F.3d 294 (5th Cir. 1993), petition for cert. pending, (No. 94-5410)(harmless error where no evidence of conscious avoidance or where substantial evidence of actual knowledge) with United States v. Ojebode, 957 F.2d 1218 (5th Cir. 1992), cert. denied, ___ U.S. ___, 113 S. Ct. 1291 (1993) (reversible error to give deliberate ignorance instruction where insufficient evidence of conscious avoidance).

when evidence has been presented showing the defendant purposely contrived to avoid learning the truth.'" Id. at 1514 (quoting United States v. de Francisco-Lopez, 939 F.2d 1405, 1409 (10th Cir. 1991)). The Hilliard court held that the issuance of the instruction on the facts before it constituted reversible error.

The error in Hilliard was similar to that below. There was evidence of actual knowledge, and evidence of a lack of knowledge. There was no evidence of acts purposely contrived to avoid learning the truth. Under these circumstances, a deliberate ignorance instruction erroneously leads the jury to believe that an actual knowledge element can be satisfied by a negligent or reckless failure to investigate the facts further, and deprives the defendant of a fair trial on the question whether he is innocent or guilty of the crime charged.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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